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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE OF PETITIONERS HANOCH TEL-OREN, *ET AL.* TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Petitioners, Hanoch Tel-Oren, *et al.*, respectfully submit this Response to the Brief of the United States as Amicus Curiae.

ARGUMENT

In its Brief as Amicus Curiae ("Amicus Brief"), the United States admits that "this case presents difficult and unresolved questions regarding the meaning and application of the alien tort statute," Amicus Brief at 7, and that " 'section 1350 appears to be generating an increasing amount of litigation.' " *Id.* at 11 (citation omitted).

These considerations argue in favor of granting the writ and seemingly align the United States with the two panel members below who urged review by this Court. App. A at 4a, 104a. Surprisingly, however, the United States contends that the Petition for a Writ of Certiorari should be denied. None of the reasons offered withstands scrutiny.

The United States' principal argument is that "[n]either the court of appeals' judgment order nor the reasoning set forth in the lengthy concurring opinions . . . creates any clear conflict in the circuits." Amicus Brief at 7. This contention fails to recognize the practical and logical effects of the D.C. Circuit's decision, which clearly conflicts in result with that of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 836 (2d Cir. 1980). The unanimous decision by the panel affirming the District Court's dismissal of the complaint means that civilian victims of terrorism and the included acts of torture, hostage-taking and summary execution cannot, in the D.C. Circuit, successfully invoke the Alien Tort Claims Act, 28 U.S.C. § 1350, in seeking redress for such acts. It is true, of course, that the panel members disagreed as to some of the reasons for this conclusion. Despite such disagreement, the per curiam statement by the court, standing as the law of the circuit, means that section 1350 cannot be invoked for the acts alleged herein. Accordingly, a trial judge within the D.C. Circuit would be compelled to dismiss claims identical to those of petitioners. In direct contrast, the Second Circuit in *Filartiga* held that a civilian victim of torture could obtain money damages under section 1350 for injuries suffered as a result of that torture. Based on *Filartiga*, petitioners' claims would have survived a motion to dismiss had they been brought in a district court within the Second Circuit. Such a clear conflict in result certainly warrants review by this Court.

The United States' contention that the D.C. Circuit reached no reviewable decision is flawed in another re-

spect, as it ignores the holding by a majority of the panel that terrorism is not a tort in violation of the law of nations. Judge Edwards stated that "I do not believe that under current law terrorist attacks amount to law of nations violations." App. A at 46a. *See also* Amicus Brief at 5. Judge Bork agreed, stating that there is a "lack of consensus about terrorism generally, and about PLO activities in particular." App. A at 71a. This holding presents an issue not only of "academic interest," as the United States asserts, Amicus Brief at 9, but of such significance and with such ramifications, *see, e.g.*, Petition at 13, as to warrant Supreme Court review.

The United States also contends that this Court should not issue a writ because the D.C. Circuit itself, in *Sanchez-Espinoza v. Reagan*, No. 83-1997, may soon be called upon to revisit section 1350 and rule on its scope and applicability. Amicus Brief at 10-11. A careful examination of *Sanchez-Espinoza* indicates, however, that it is unlikely that the Court of Appeals will even reach such questions regarding section 1350, much less resolve them. First, the District Court in *Sanchez-Espinoza* relied only on the political question doctrine in dismissing plaintiffs' complaint, never deciding whether plaintiffs had a cause of action under section 1350. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 597-602 (D.D.C. 1983), *appeal pending*, No. 83-1997.[1] The applicability of section

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[1] The District Court stated:

> Because we dismiss this lawsuit as non-justiciable, we do not decide whether any or all of those sources of international law create a legal foundation for the relief requested by plaintiffs. *Compare Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (torture is a violation of the law of nations that gives rise to an action for damages in federal court), *with Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981) (law of nations or treaties must provide for private right of action in order for an injured plaintiff to obtain relief in federal court under alien tort statute, 28 U.S.C. § 1350).

568 F. Supp. at 601 n.6.

1350, therefore, is not likely to be reached by the Court of Appeals, either. Second, *Sanchez-Espinoza*, unlike this case, involves an attempt to sue officials of the United States government, and thereby raises significant questions of sovereign immunity. Both the political question doctrine and the doctrine of sovereign immunity, therefore, are independent and adequate grounds upon which the D.C. Circuit may decide *Sanchez-Espinoza*. Thus, the United States is disingenuous in suggesting that the issues presented by petitioners to this Court are squarely presented in *Sanchez-Espinoza*, and that these issues are likely to be resolved by the D.C. Circuit in that case.[2]

Another argument offered by the United States is that any decision by this Court "might not affect the result in this case." Amicus Brief at 12. The United States asserts, for example, that petitioners "failed to complete service upon Libya and the PLO," *id.* at 2, 13, citing a footnote in Judge Green's opinion. As reflected in the District Court record, however, this assertion is plainly incorrect. First, the record reflects that the Clerk of the Court was instructed, pursuant to 28 U.S.C. § 1608, to mail all pleadings, previously translated into Arabic, to the Secretary of the Peoples Bureau for Foreign Affairs

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[2] Oddly, the United States government's interpretation of section 1350, a two hundred year-old statute enacted by the First Congress, Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), has recently undergone a complete reversal. In *Sanchez-Espinoza*, the government argues that section 1350 is "purely jurisdictional" and "cannot be interpreted . . . to authorize individuals to enforce in domestic courts private rights of action derived directly from customary international law." Amicus Brief at 11 n. 11. In stark contrast, the Departments of State and Justice stated in their *amicus curiae* brief in *Filartiga* that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights," and that "private enforcement is entirely appropriate." Brief for the United States, App. C at 132a. Certainly, the availability of a remedy for those individuals whose claims fall within the scope of section 1350 should not vary every four years.

in Tripoli, Libya, for service upon the Libyan Arab Republic. Second, as also documented and reflected in the record, a special process server served the Palestine Liberation Organization on March 10, 1981, by leaving copies of the summons and complaint with a person authorized to accept service.[3] Service has been effected, therefore, as to Libya and the PLO. Furthermore, the question of service was never raised before the District Court: service was not challenged, the issue was never heard or argued, no motion was ever made, and no ruling was ever entered.

The United States, choosing to ignore the relevant statutes and case law previously cited by petitioners, *see* Petition at 6 n.2; Reply Brief at 4-7, also asserts that the statute of limitations would bar petitioners' claims. Petitioners have already demonstrated that their claims for intentional infliction of emotional distress, for intentional infliction of cruel, inhuman, and degrading treatment, and for the claims set forth in Counts II, III, and V are governed by the three-year limitations period in D.C. Code Ann. § 12-301(8). The claims of the thirty-four minors cannot be time-barred, moreover, regardless of the statute of limitations found to be applicable.

Finally, the United States relies on the Foreign Sovereign Immunities Act as a bar to this action. As outlined in the Petition, even if the Act were held to preclude an action against Libya, it would not bar suit against the PLO, which is alleged to have acted as that state's agent. *See* Petition at 17-18 n.9.[4]

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[3] In addition to serving the PLO directly, petitioners allege that the Palestine Information Office, which also has been served, is the alter ego of the PLO.

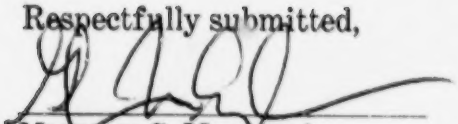
[4] Each of these arguments by the United States seems to presume that no viable defendant is present against which petitioners can litigate. This presumption ignores the fact that the National Association of Arab Americans has fully briefed this case at every level, and is an active and present defendant.

The United States contends that review is improper because the Alien Tort Claims Act is "a rarely used and little understood provision of the Judicial Code." Amicus Brief at 7. The United States' brief itself, however, illustrates that the statute's use and importance cannot be underestimated. It states, for example, that section 1350 " 'appears to be generating an increasing amount of litigation.' " *Id.* at 11 (citation omitted); *see generally, id.* at 11-12, and n.12. This case provides the Court with the immediate opportunity to define the precise nature and scope of section 1350, and to guide the lower courts as the statute is increasingly invoked. Furthermore, the United States never denies the significance of the issues presented, choosing instead to urge the Court to wait for another day to resolve them.

None of the arguments offered by the United States can mask the profound significance of the issues presented by the Petition. This case questions whether the federal courts will provide a right of redress for the ninety-five adults and twenty-six children who were all victims of state-sponsored terrorism, torture, maiming, and execution. Every day we read and hear of our government's repeated denunciations of international terrorism. Indeed, one cannot pass the White House, the Capitol, or the State Department without noticing the security measures that reflect our ever-increasing fear that we, too, will become the victims of a terrorist attack. The time is ripe, therefore, to provide the victims of a terrorist attack with an effective remedy.

For the reasons set forth above and in the Petition, a writ of certiorari should issue to review the opinion and judgment of the District of Columbia Circuit.

Respectfully submitted,



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